

1989

State of Utah v. Robert John Dewaal : Brief of Appellant

Utah Court of Appeals

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Utah Attorney General; Attorney for Respondent.

Mark A. Besendorfer; Attorney for Appellant.

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MENT
NO. 89-0654

UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,

:

Plaintiff/Respondent,

:

vs.

:

ROBERT JOHN DEWAAL,

:

Case No. 890654-CA

Defendant/Appellant.

:

BRIEF OF APPELLANT

Appeal from the Judgment of the Third
District Court for Salt Lake County
Honorable Richard H. Moffat, Judge

DEPOSITED BY THE
STATE OF UTAH
AUG 20 1990

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Attorney for Respondent
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Salt Lake City, Utah 84114

Argument Classification No. 2

UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
vs.	:	
ROBERT JOHN DEWAAL,	:	Case No. 890654-CA
Defendant/Appellant.	:	

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated 78-2A-3 (f).

NATURE OF THE PROCEEDINGS

This is an appeal from the Third District Court, Judge Dean Conder as trial judge. Judge Richard Moffat heard the motion to set aside a plea of guilty, which was entered before Judge Conder, since retired, on the 24th of February, 1986. Defendant appeals Judge Moffat's Order, entered on the 12th of October, 1989, denying his motion to withdraw his plea.

STATEMENT OF THE ISSUE

The sole issue involved on appeal is whether the plea of the Defendant was made voluntarily and knowingly, with a full understanding of Defendant's rights, as required by Rule 11 of the Utah Rules of Criminal Procedure and applicable case law.

DETERMINATIVE PROVISIONS

The determinative provision of statutory law is contained in Rule 11 of Utah Rules of Criminal Procedure set forth in the addendum.

STATEMENT OF THE CASE

On the 24th day of February, 1986 the defendant appeared before the Honorable Dean E. Condor for a hearing to change his plea to certain charges pending against him. He was represented by counsel, Bryan L. McDougal, who took over the defense and the suspension, by the bar, of defendant's previous counsel, Con Kostopolous. Mr DeWaal pleaded guilty to one count of sexual abuse of a child, a second degree felony. He was subsequently sentenced to a term of 1-15 years in the Utah State Prison, where he is presently incarcerated.

At the time of sentencing, defendant's counsel brought to the Court's attention the fact that the defendant was not satisfied with the advice he received from his lawyer and suggested to the Court that defendant be given an opportunity to seek further advice. He (counsel) expressed concern about going ahead with the sentencing. The Court asked the defendant if there was anything he would like to say and defendant offered no statement. No further inquiry was made regarding the issue and sentencing proceeded. It should be noted that no questions were asked of the defendant regarding his satisfaction with his attorney at the change-of-plea hearing.

SUMMARY OF THE ARGUMENT

Defendant argues that Rule 11 is mandatory, and because it is based upon constitutional provisions, must be strictly followed. The trial judge failed to follow several significant portions of the rule in accepting the plea.

ARGUMENT

THE TRIAL COURT FAILED TO FOLLOW THE REQUIRED PROCEDURE IN ACCEPTING DEFENDANT'S PLEA

Rule 11 of the Utah Rules of Criminal Procedure squarely places on the trial court the burden of ensuring that constitutional and statutory requirements are complied with when a guilty plea is entered. This requirement is rooted in the fundamentals of due process as stated in Boykin v. Alabama, 395 U.S. 238 (1969). A plea must be entered knowingly and voluntarily. Rule 11 embodies these constitutional principles, and because of the important rights involved, must be strictly complied with. State v. Vasilacopulus, 756 P. 2d 92 (Ut. App. 1988).

This is obviously because Rule 11 merely restates and codifies the constitutionally based requirements set forth in Boykin, supra and its progeny. Accordingly, the language of Rule 11(e) is stated in mandatory terms.

"The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the proper finding:...(Rule 11(e) of the Utah Rules of Criminal Procedure, emphasis added).

The rule goes on to state the various findings the court shall make. In summary the court must find that the defendant knows that:

1. He has the right against compulsory self-incrimination;
2. He is entitled to a jury trial;
3. He has the right to confront and cross examine witnesses in open court;
4. He understands the nature and elements of the crime with which he is charged;
5. That, at trial, the prosecution has the burden of proving those elements;
6. That the burden of proof is beyond a reasonable doubt.
7. That a guilty plea is an admission of all the elements;
8. That a guilty plea waives the rights that he has been apprised of;
9. The maximum and minimum penalties and the possibility of consecutive sentences to multiple counts.

If the requirements of Rule 11 are not met the plea is invalid and may properly be withdrawn.

Several recent Utah cases have dealt with this issue. In State v. Gibbons, 740 P.2d 1309 (Utah 1987) the Utah Supreme Court declared a plea invalid, in spite of a fairly detailed inquiry by the court where several requirements of Rule 11 were not met.

And, although, as in this case, affidavits can be used to help assure compliance, a completed affidavit is no

substitute for a thorough inquiry on the record in open court.

The use of a sufficient affidavit can promote efficiency, but an affidavit should be only the starting point, not an end point, in the process. The trial judge should then review the statements in the affidavit with the Defendant, question the Defendant concerning his understanding of it, and fulfill the other requirements imposed by §77-35-11 on the record before accepting the guilty plea. Gibbons, supra at 1313-1314, as quoted in State v. Valencia, 112 Utah Adv. Rep. 42 (Ut. App. 1989).

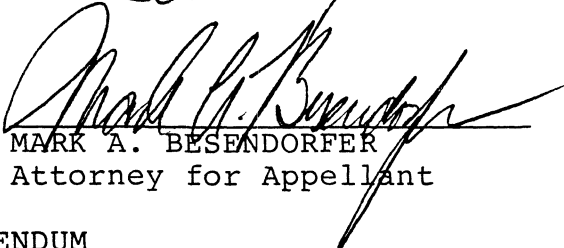
The inquiry in this case is lacking in several respects. The Court did not explain to the defendant the elements of the crime nor the relationship between the law and the facts (See McCarthy v. United States, 394 U.S. 459 (1969)). The Court did not explain that the defendant had the right to cross examine the witnesses against him. Although the defendant was told that he had a right not to testify, he was not told that he had a right against compulsory self-incrimination and that a plea of guilty was a waiver of that right and an admission of the elements. He was told what the burden of proof was; he was not told who had that burden and the result of a failure to meet that burden. And he was not told that he had a right to appeal and that he was, in effect, waiving that right.

CONCLUSION

The law relating to acceptance of pleas is very clear and is strictly construed, because of the

constitutional rights involved. The court in this case made an inadequate inquiry of the defendant as to the voluntariness of the plea and Defendant's motion to withdraw the plea should be granted.

DATED this 30th day of January, 1990.


MARK A. BESENDORFER
Attorney for Appellant

ADDENDUM

Rule 11 of the Utah Rules of Criminal Procedure provides:

Pleas. (a) Upon arraignment, except in case of an infraction, a Defendant shall be represented by counsel, unless the Defendant waives counsel in open court, and shall not be required to plead until he has had a reasonable time to confer with counsel.

(b) A Defendant may plead not guilty, guilty or no contest. If a Defendant refuses to plead or if a Defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A Defendant may plead no contest only with the consent of the court.

(d) When a Defendant enters a plea of not guilty, the case shall forthwith be set for trial. In non-felony cases the court shall advise the Defendant, or his counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings.

1. That if the Defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;

2. That the plea is voluntarily made;

3. That the Defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses

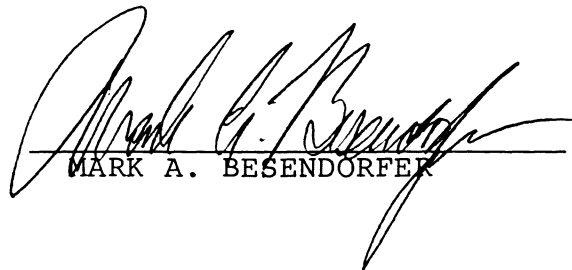
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UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:
Plaintiff/Respondent,	: CERTIFICATE OF MAILING
vs.	:
ROBERT JOHN DEWAAL,	: Case No. 890654-CA
Defendant/Appellant.	:

I certify that a true and correct copy of the
Brief of Appellant was mailed to the Utah Attorney General,
Attorney for Respondent, State Capitol, Salt Lake City, Utah
84114, postage prepaid, this 31st day of January,
1990.



MARK A. BESENDORFER

against him, and that by entering the plea he waives all of those rights;

4. That the Defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;

5. That the Defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and

6. Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the same shall be approved by the court. If recommendations as to sentence are allowed by the court, the court shall advise the Defendant personally that any recommendation as to sentence is not binding on the court.

(f) The judge shall not participate in plea discussions prior to any agreement being made by the prosecuting attorney, but once a tentative plea agreement has been reached which contemplates entry of a plea in the expectation that other charges will be dropped or dismissed, the judge, upon request of the parties, may permit the disclosure to him of such tentative agreement and the reasons therefor in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will approve the proposed disposition. Thereafter, if the judge decides that final disposition should not be handled in conformity with the plea agreement, he shall so advise the Defendant and then call upon the Defendant to either affirm or withdraw his plea.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

--oo00oo--

STATE OF UTAH,
Plaintiff, :

--vs--

: CR 85 1454

ROBERT JOHN DEWAAL, :
Defendant. :

CHANGE OF PLEA

:

BE IT REMEMBERED, that on February 24, 19 6, the
above-entitled cause of action came on regularly before the
HONORABLE DEAN E. CONDER, one of the Judges of the above-
named Court at the hour of 9:00 a.m.

A P P E A R A N C E S

For the State:

MS. BARBARA J. BYRNE
Deputy County Att.
231 East 4th South
Salt Lake City, Utah

For the Defendant:

MR. BRYAN L. McDOUGAL
Attorney At Law
8 East Third South
Salt Lake City, Utah

WHEREUPON the following proceedings took place:

1 THE COURT: Matter of the State of Utah versus
2 Robert John DeWaal. Are you Mr. Robert John DeWaal, Sir?

3 A. Yes, Sir.

4 THE COURT: I understand, counsel, there's going
5 to be a Change of Plea in this case; is that correct?

6 MR. McDOUGAL: That's correct, Your Honor, on a
7 Plea Bargain to a lesser offense under 76-5- 401.

8 THE COURT: Then what will the charge be?

9 MS. BYRNE: Charge would be sexual abuse of a
10 child, Your Honor.

11 THE COURT: A Second Degree?

12 MS. BYRNE: That's correct. Barbara Byrne,
13 appearing for the State.

14 THE COURT: Counsel, do you propose to withdraw
15 the heretofore not guilty plea entered on the charge, as
16 set forth in the Information?

17 MR. McDOUGAL: Yes, we do, Your Honor.

18 THE COURT: Then, to the amended--which I assume
19 would be included offense--charge of sexual abuse upon a
20 child, a Second Degree Felony, which is punishable by
21 confinement in the Utah State Penitentiary for not less
22 than one or more than 15 years, or a fine of \$10,000 or
23 both; to that charge, how do you plead, guilty or not guilty?

24 MR. DEWAAL: Guilty.

25 THE COURT: Before I accept that, how old are

1 you, Sir?

2 A. I am fifty-two.

3 Q. What is your educational background?

4 A. Just high school.

5 Q. Where did you go to high school?

6 A. South High.

7 Q. Can you read and write the English language
8 allright?

9 A. I went--not too good in English.

10 Q. Read this affidavit that's in front of you?

11 A. Yes.

12 Q. You can understand that?

13 A. Yes, Sir.

14 Q. Do you have any questions about it?

15 A. No, Sir.

16 Q. Has it been explained to you by your lawyer?

17 A. Yes, Sir. He just explained to me.

18 Q. Are you doing this of your own free will, other
19 than for the Plea Bargain of a reduction in the Degree?

20 A. Yes, Sir.

21 Q. You understand there has been no prior agreement
22 with the Court as to what the punishment should be?

23 A. I understand that.

24 THE COURT: As I recall, this is a 1 to 15 years,
25 isn't it, counsel?

1 MR. McDOUGAL: Yes, it is, Your Honor.

2 THE COURT: Or a fine of \$10,000 or both and there
3 has been no agreement with the Court ;you understand that?

4 MR. DeWAAL: Yes, Sir.

5 THE COURT: Has anybody made any threats or
6 promises to you to cause you to want to enter this Plea?

7 A. No, Sir.

8 Q. You understand, that by entering a Plea of
9 Guilty, you give up your right to a jury trial of eight
10 jurors, who would have to find you guilty by unanimous
11 verdict and they would have to find it, based upon evidence
12 beyond a reasonable doubt;you understand you're giving up
13 that right?

14 A. Yes, Sir.

15 Q. You understand also, that you would not be
16 required to testify;and the fact you don't testify could
17 not be held against you;you understand that right?

18 A. Yes, Sir.

19 Q. Are you, at this time, under the influence of
20 any drugs or alcohol of any nature whatsoever?

21 A. No, Sir.

22 THE COURT: Very well. You may execute the affi-
23 -davit.

24

25

1 Mr. DeWaal, you swear that the information
2 contained in this affidavit is true and correct?

3 | A. Yes, Sir.

4 THE COURT: The Court will acknowledge the signature
5 of Mr. DeWaal, accept the plea, find that it's knowingly
6 and voluntarily made.

7 Under the law, Sir, I have the duty to impose
8 sentence in not less than two or more than thirty days.
9 I know nothing about you--don't think I ever met you
10 before;and I think I would like a pre-sentence report.
11 That agreeable, counsel?

12 MR. McDOUGAL: Yes, Your Honor. We'll waive the
13 maximum time for sentencing and ask for a pre-sentence
14 report.

15 THE COURT: Set this for sentencing for March 28th
16 at 9:00 a.m. Going to order Mr. DeWaal that you report
17 back to this Court March 28, 1986 at 9:00 a.m. for
18 sentencing. Going to order that you report today to the
19 Adult Parole and Probation Department in order they can
20 commence the necessary paper work. Do you understand
21 that, Sir?

Yes, Sir.

23 | THE COURT: Very well, that will be the order.

24 MR. McDOUGAL: Thank you.

25 (WHEREUPON this hearing was concluded.)

IN THE DISTRICT COURT IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

--oo00oo--

STATE OF UTAH, :
Plaintiff,

--VS-- :

CR 85 1454

ROBERT JOHN DEWAAL, : S E N T E N C I N G
Defendant. -----

BE IT REMEMBERED, that on March 28, 1986, the above
captioned cause of action came on regularly before THE
HONORABLE DEAN E. CONDER, one of the Judges of the above-
named Court at the hour of 9:00 a.m.

A P P E A R A N C E S

For the State: MR. THOMAS P. VUYK
Deputy County Attorney
231 East Fourth South
Salt Lake City, Utah

For the Defendant: MR. BRYAN L. McDOUGAL
Attorney At Law
8 East Third South
Salt Lake City, Utah

WHEREUPON the following proceedings were had:

1 THE COURT: State of Utah versus Robert John DeWaal.
2 You are Mr. Robert John DeWaal, Sir?

3 A. Yes, Sir.

4 THE COURT: Time set for imposition of sentence.
5 Any reason you know why sentence should not be pronounced
6 at this time?

7 MR. McDOUGAL: No, Your Honor.

8 THE COURT: Anything you want to say on his behalf?

9 MR. McDOUGAL: I would indicate to the Court that
10 I had an opportunity to read the the rather lengthy pre-
11 -sentence report in this matter. There are two matters
12 that concern me. The first one I think we should take
13 care of primarily is, that Mr. DeWaal has indicated in
14 there, he is dissatisfied with the advice he received
15 from his counsel; if that is in fact the case, then perhaps
16 we ought to give Mr. DeWaal a chance to seek additional
17 advice. I am somewhat concerned to go ahead with senten-
18 -cing, given that indication in the pre-sentence report.

19 THE COURT: Mr. DeWaal, anything you would like to
20 say, Sir?

21 A. I have nothing to say, Sir.

22 THE COURT: Ok.

23 MR. VUYK: I would indicate, Your Honor, to the
24 Court, that if I am not mistaken, in a case of this nature
25 the Court asking him preliminarily at his plea whether he

is happy with the advice of counsel and also a response of yes;and apparently that doesn't come about until now he found out what the recommendation is,for prison. I would ask the Court to take those matters under consideration at this time.

THE COURT: Ok.

MR. McDOUGAL: The second matter, of course, is the nature of the recommendation, which is imprisonment. Mr. DeWaal's brother is here today and I would simply express to the Court his willingness and desire that he take his brother with him and look after him, and act as his counselor and advisor; and in effect, his probation officer. And he has invited Mr. DeWaal into his home to live there. He indicated he'll do everything possible to help his brother straighten out his problems; and with the probation supervision, he felt his brother can be better helped in his home with extensive counseling and supervision than he can be helped in the prison. His brother lives in Colorado. His brother works and has a good job. Has a family there and makes good income. Mr. DeWaal is undergoing a divorce at the present time and is living with his mother and his brother, and feels that he is his brother's keeper and wants to take on that obligation; and I would simply ask the Court to take that into consideration. I have nothing further.

1 THE COURT: State have any recommendation?

2 MR. VUYK: Our recommendation is, that we feel
3 that the recommendation of the prison sentence and the pre-
4 sentence report indicates the Defendant totally unwilling
5 to accept any responsibility, therefore, no counseling or
6 other program would be available. I recommend that he be
7 incarcerated.

8 THE COURT: Anything you would like to say on your
9 own behalf, Mr. DeWaal?

10 A. No, Sir.

11 THE COURT: These kinds of cases give me real
12 grave concern both for your sake and for the sake of the
13 victims who are involved in these; and I have got a very
14 extensive file on this. No way that society can tolerate
15 such conduct. It's the judgment of this Court that you be
16 sentenced to the Utah State Penitentiary for not less than
17 one or more than fifteen years; commitment to issue forth-
18 -with. Good luck to you.

19 MR. McDONALD: Thank you, Your Honor.

20 WHEREUPON this hearing was concluded.)

21

22

23

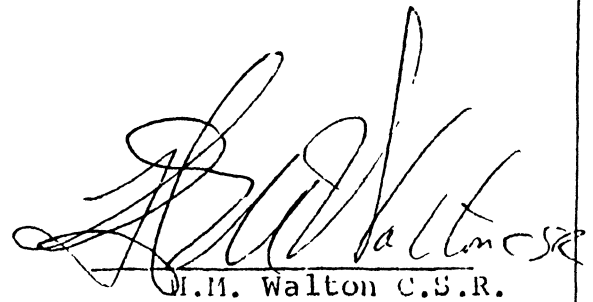
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25

C E R T I F I C A T E

SALT LAKE COUNTY } SS.
STATE OF UTAH }

I, Hal M. Walton, do hereby state that I am a
Certified Shorthand Reporter of the State of Utah; that
on February 24 and March 28, 1986, I appeared before the
above-named Court and reported on Stenotype the proceed-
-ings set forth in the transcripts attached hereto and
that my shorthand notes having been transcribed by me
making up the contents of said transcripts on those
above-named dates, are true and correct.


H.M. Walton C.S.R.

Dated: August 1, 1989.